FILED
AUG 2 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

——— Term, 1954

No. 254

JOHN EVERETT JENSEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ALAN LOTH
706 Snell Bldg.,
Fort Dodge, Iowa,
Attorney for Petitioner

ALBERT L. HABHAB,
702 Snell Bldg.,
Fort Dodge, Iowa,
Attorney for Petitioner.

Law Briefs — OMAHA LINO-SLUG PRINTING CO. — 418 So. 15th St.

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ:	
1. The questions presented are substantial and are of special importance in view of the conflict of the decision below with controlling decisions of this Court and of other Courts of Appeals involving the same questions	7
Conclusion	11
Appendix:	
A. Opinion	12
B. Judgment	17

CITATIONS

Affronti vs. United States, 8 Cir., 145 F. 2nd 3, 5	13
Anderson v. United States, 5 Cir., 30 F. 2nd 485	9
Egan v. United States, 8 Cir., 137 F. 2nd 369	13
Heath v. United States, 10 Cir., 169 F. 2d 1007	16
Holmes v. United States, 8 Cir., 134 F. 2d 125	13
Jenkins v. United States, 5 Cir., 149 F. 2d 118, 119	16
Ledbetter v. United States, 170 U. S. 606, 18 Sup. Ct. 774 (42 L. Ed. 1162)	7
Miller v. United States, 8 Cir., 138 F. 2d 258	13
M'Nutt v. United States, 8 Cir., 267 F. 670	8
Rood v. United States, 4 Cir., 7 F. 2d 45	7
United States v. Bonham, D. C., S. C., 31 F. 808	7
United States v. Logan, Fed. Cas. No. 15,624 (Cir. Ct., E. D. Tenn.)	9
United States v. Jackson, 1 Hughes 531 (Fed. Case No. 15,455)	7
United States v. Rennecke, D. C., S. C., 28 F. 847	7, 8

STATUTES

U. S. C. A., Title 26, Section 3253	2, 11
U. S. C. A., Title 26, Section 3254	3, 13
U. S. C. A., Title 28, Section 1254 (1)	2

IN THE

Supreme Court of the United States

———— Term, 1954

o———o———o

No. ————

o———o———o

JOHN EVERETT JENSEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

o———o———o

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

o———o———o

John Everett Jensen, Petitioner herein, prays that a writ of certiorari issue to review the judgment entered in this case on June 17, 1954, by the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the Court of Appeals has not been reported as of this date but it is set forth herein as Appendix "A". The proceedings in the District Court were not officially reported.

JURISDICTION

The judgment of the Court of Appeals was reviewed and entered on June 17, 1954. On the 16th day of July, 1954, an Order was entered extending the time for the filing of the petition for Writ of Certiorari in this matter to and including the 2nd day of August, 1954. The jurisdiction of the Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

Did the United States Government prove beyond a reasonable doubt that the petitioner, during the months of July, August and September, 1952, in violation of Section 3253, Title 26 U. S. C. A., in Webster County, Iowa, was carrying on the business of a wholesale liquor dealer and that he willfully failed to pay the special tax as required by law so as to make it a question of fact for the determination of the jury?

Was the Court of Appeals correct when they stated that the jury was justified in finding that the petitioner was guilty of the offense charged in the indictment?

Did the United States Government prove that the petitioner was engaged in the wholesale liquor business to warrant a finding by the Court of Appeals that the trial court acted correctly in refusing the petitioner's motion for judgment of acquittal after the jury had returned a verdict of guilty?

STATUTES

Section 3253, Title 26, U. S. C. A.:

"Any person who shall carry on the business of a brewer, rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, retail dealer in malt liquors or manufacturer of stills,

and willfully fails to pay the special tax as required by law, shall for every such offense, be fined not less than $100 nor more than $5,000 and be imprisoned for not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in any building, room, yard, or enclosure connected therewith and used with or constituting a part of the premises, shall be forfeited to the United States."

Section 3254 (b), Title 26, U. S. C. A.:

"Except as otherwise provided, any person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors in quantities of five wine-gallons or more to the same person at the same time, shall be regarded as a wholesale dealer in liquors; provided, That the Commissioner may, by regulation, with the approval of the Secretary, provide for the issuance of a stamp denoting payment of such special tax as a 'wholesale liquor dealer in wines' or a 'wholesale dealer in wines and malt liquors' if, as the case may be, wines only, or wines and malt liquors only, are sold by a wholesale dealer in liquors."

STATEMENT

By the indictment in this action the petitioner, John Everett Jensen, was charged by the Grand Jury as follows:

"That John Everett Jensen, during the months of July, August and September, 1952, in violation of Section 3253, Title 26, United States Code, in Webster County, in the Central Division of the Northern District of Iowa, did carry on the business of a wholesale liquor dealer, and did willfully fail to pay the special tax required by law." (R. p. 1.)

The petitioner entered a plea of not guilty to the charge contained in the indictment, a trial was had before a jury and the petitioner was found guilty under the indictment by the jury (R. p. 2).

The petitioner was convicted by a jury of being a wholesale dealer in liquor. The record shows that shortly before the alleged acts of sale took place one Paul Ross and Eldo Less entered into an agreement for the storage of the whiskey on a farm leased by the father of Eldo Less. For the right to store the whiskey on the farm Paul Ross paid Eldo Less a certain sum of money (R. pp. 5 and 6). The petitioner had nothing to do with the arrangements for the storage of the whiskey on the farm and in fact the government's witness, Eldo Less, testified that he had never seen the petitioner deal in whiskey on his farm at any time after July 4, 1952 (R. p. 5).

The petitioner's truck was seen on the Less farm full of whiskey. However, at the time that the truck was seen the petitioner was nowhere around (R. p. 5). Ross and the petitioner, later on in the morning, came to the Less farm and informed Eldo that they would get the whiskey that night. Later that night Ross and the petitioner came to the farm and started to haul the whiskey away. It was at this time that Williams made his second purchase of whiskey (R. p. 5).

The record discloses that sometime during the month of August, 1952, in a tavern owned by Paul Ross, the petitioner asked Williams if he could use some whiskey. Williams replied that he could. On about August 5th, 1952, Ross informed Williams that the whiskey was in and they agreed among themselves to meet on a country road east of town for the purpose of completing the sale

(R. p. 7). After they had met, Ross took the petitioner into town and he in turn returned with a carload of whiskey in an automobile owned by Ross. Williams at this time loaded the ten cases of whiskey he had purchased into his car. He then informed PAUL ROSS to come down to the tavern where he worked and he would pay him for the whiskey. He stated further that he did not want the petitioner to come into the tavern. He did pay Ross for the whiskey on a subsequent day. He did not pay the petitioner for any whiskey at any time (R. pp. 7 and 9).

The record further discloses that a similar transaction took place. Around September 20 Williams and the petitioner again met in the tavern owned by Ross and the petitioner again asked Williams if he could use some whiskey. Williams said that he could and that he would take 20 cases. On the morning of September 20, 1952, Ross went to the tavern where Williams worked and again informed him that the whiskey was in. It was at this time that Ross and Williams agreed to meet at noon so that Williams could get one case of whiskey which he needed immediately. Williams received the one case of whiskey and they then agreed to meet out there that night so that he could get the other 19 cases of whiskey (R. p. 9). When Williams was on the farm that noon he saw the petitioner and also his truck full of whiskey. When Williams went out to the Less farm that evening to get the other 19 cases of whiskey, Ross, Less and the petitioner were there. They took about 12 cases out of the cornfield and about 7 cases from the petitioner's truck. The petitioner did help to load the whiskey into the car of Williams. The record shows that the petitioner quoted Williams the price for the whiskey and above all that he (Williams) paid Ross $400.00 for the whiskey he obtained in August and $800.00 for the whiskey he obtained

in September. Once again Williams at no time paid the petitioner for any whiskey (R. p. 8).

The petitioner testified on his own behalf. He lived in Fort Dodge, Iowa, and worked on a farm during the summer of 1952. He testified that he at no time offered to sell whiskey to Williams and that he never received any money for any whiskey. His testimony to this effect is substantially supported not only by his testimony but also by the testimony of the purchaser and Eldo Iess. He also testified that he had nothing to do with the storage of the whiskey on the Less farm. He stated that he had loaned his truck to Paul Ross and that when he had done so there was not any whiskey upon it. When the petitioner saw what his truck was being used for he informed Paul Ross that he did not like the way his truck was being used (R. p. 12). He admitted that he aided in the loading of the Williams' car with the whiskey but he stated further that he did so under the supervision and direction of Paul Ross. When the dealings were completed the whiskey was taken by the petitioner to the home of the brother of Paul Ross. This was delivered in the truck owned by the petitioner.

After the close of the evidence of the United States Government the defendant moved the Court to take the case from the jury and direct a verdict for the defendant (R. p. 10) and the same was overruled (R. p. 11). At the close of all the evidence and before the case was submitted to the jury the defendant again moved the Court for a directed verdict and the same was again overruled (R. p. 13). After the case had been submitted to the jury and after the jury had found the defendant guilty, he made a motion for a Judgment of Acquittal and Motion for a New Trial (R. p. 18) and the same was overruled (R. p. 21).

It was upon the rulings on these motions that the defendant appealed to the Court of Appeals for the Eighth Circuit.

REASONS FOR GRANTING THE WRIT

The decision of the Court below is directly in conflict with the case of *Ledbetter vs. United States,* 170 U. S. 606, 18 Sup. Ct. 774 (42 L. E. 1162), wherein the Court stated as follows:

> "The Offense does not consist in selling or offering for sale to a particular person distilled spirits, etc., in less quantities than five gallons at one time, but in carrying this on as a business; in other words, in the defendant holding himself out to the public as selling or offering for sale, etc. While it has been sometimes held that proof of selling to one person was, at least, prima facie evidence of criminality, the real offense consists in carrying on such business, and if only a single sale were proven it might be a good defense to show that such sale were exceptional, accidental or made under circumstances as to indicate that it was not the business of the vendor. See also United States v. Jackson, 1 Hughes 531 (Fed. Cas. No. 15,455); United States v. Rennecke (D. C.), 28 Fed. 847. It is quite evident that an indictment averring in the language of section 18 that the defendant sold or offered for sale liquors named, without averring that he made this a business and that he had not paid the special tax required by law would be insufficient. See also McNutt v. United States, 267 Federal 670, United States v. Bonham (D. C.), 31 Federal 808, 809."

The decision in the Court below is in further conflict with the case of *Rood vs. United States,* 7 Fed. 2, 45 (4th Circuit), wherein the Court states:

> "One cannot offend against the Revenue Statutes unless he has actually carried on the business of

selling liquor at retail or wholesale as the case may be. Whether he has in fact done so is tested in the same way as it would be if the occupation tax, instead of being levied on a dealer in spirituous liquor was imposed upon one who followed the business of selling cigars, candy, stationery or soft drinks, or any other article upon the business of dealing in which Congress saw fit to impose an excise tax." See also *United States vs. Rennecke,* 28 Fed. 847.

The learned Judge who wrote the decision in the Court below recognized that the offense does not consist in selling or offering for sale to a particular person distilled spirits, etc., but in carrying this on as a business. In the case of *M'Nutt vs. United States,* 267 Federal, 670 (8th Circuit), which the learned Judge wrote the decision of in 1920, it is stated as follows:

> "Again, this is not a prosecution for selling liquors; it is a prosecution for carrying on the business of a retail liquor dealer without having paid the special tax required by law." * * *

It is further stated that:

> " 'The offense,' says the Supreme Court, 'does not consist in selling or offering for sale to a particular person distilled spirits, etc., in less quantities than five gallons at one time, but in carrying this on as a business; in other words, in the defendant holding himself out to the public as selling or offering for sale, etc.' Ledbetter vs. United States, Supra."

The learned Judge in the M'Nutt case stated further that one or two sales of liquor are not sufficient to convict of carrying on the business of a retail liquor dealer without having paid the special tax when made by one having none of the appliances or surroundings of retail liquor dealers, to an intimate acquaintance or friend out of the seller's private stock not held for or offered to pur-

chasers who should apply for it. After stating that there was no substantial evidence at the trial below that the defendant was guilty of carrying on the business of a retail liquor dealer the Honorable Judge again stated in substantiation of this conclusion that:

> "There was no evidence that the defendant had any of the usual appliances and accommodations of a retail liquor dealer, that he held himself out as a dealer or that he had or offered distilled spirits, wines or malt liquors for sale to those who might apply for it."

It is a well known proposition of law that in criminal cases where the life or liberty of the citizen is at stake, the Courts of the United States in the exercise of sound discretion may notice and relieve from radical errors in the trial which appears to have been seriously prejudicial to the rights of the defendants, although the questions they present were not properly raised or preserved by objection, exception, request or assignment of error.

The decision in the Court below is in conflict with the case of *Anderson vs. United States,* 30 Federal 2, 485 (5th Circuit), wherein it was stated:

> "One who is a mere employee may be guilty as an accomplice of making an illegal sale of liquor but he cannot be an accomplice and therefore regarded as a principal, in conducting a business, unless he is in fact one of the proprietors whose duty it is to pay the license tax."

As the Court stated in *United States vs. Logan,* Federal Case No. 15,624 (Circuit Court, E. D. Tennessee):

> "It is the party or parties having an interest in as proprietors of the distillery that can in law be said to be carrying on the business. Any different

construction which would hold a clerk or employee liable to a criminal prosecution because of a failure of a principal or proprietor to comply with the law, on which to base it, no matter what Court or Judge has or shall decide. If this is so, then not only the employees, but the clerk and the hired laborer will be required to pay the special tax, and in this way more than one special tax will be required for the same business. This the government does not require, and, therefore, only the party or parties in interest case, proprietors or owners, does the government look to for payment of the special tax; or if that be not paid and the business carried on against him only does it inflict its punishment. He alone can be said to be 'carrying on the business.' * * * It must be shown by the Government before they can obtain a conviction that not only was the defendant acting for himself and not as an employee of another, but the defendant must be proven to have held himself out publicly in some way as following the business as at least one of his means of gaining a livelihood. It must be a business which the party engages in in such a manner and to such an extent as shows a readiness to supply whoever may reasonably be expected to call on him. Occasional acts or a few instances of selling spirits do not constitute the offense, if the matter is not done in such manner as shows that it is a business regularly carried on, not secretly, and to the future, but publicly and to all who desire to purchase upon the same terms."

The Court below in rendering the decision in this case is in conflict with the controlling decisions of this Court and the other Circuit Courts as cited. It would appear from the decision of the Court below that even had the petitioner been an employee of Paul Ross a sufficient amount of evidence had been produced by the United States Government to make a factual question for the jury. The evidence as presented by the Government conclusively shows that Paul Ross made the entire

arrangements for the storage of the whiskey, that he made the arrangements with the purchasers of the whiskey, for its transfer from his possession to that of the purchasers and that he received all money from the alleged sales. The only connection that this petitioner had with the sales was that some of the whiskey was seen on a truck which belonged to him and that on two occasions he offered to sell whiskey to a James Williams and that he aided in loading the whiskey at the time of the alleged sales. It was Paul Ross who arranged the meetings between the parties concerned. It was his place of business where the arrangements for the sale of the whiskey were made and it was he who informed the purchaser of the whiskey that it was in and ready for sale. After the last sale of whiskey had taken place it was to the home of the brother of Paul Ross that the whiskey was taken. It is the contention of the petitioner that the Government's proof did not show beyond a reasonable doubt that he was carrying on the business of a wholesale liquor dealer as defined by the decisions of the Courts as cited. In the interest of uniformity among the Circuit Courts and in view of the conflict of the decision below with the controlling decisions of this Court, this Court should assume jurisdiction of the cause herein.

CONCLUSION

For the foregoing reasons we respectfully submit this Petition for Certiorari should be granted.

ALAN LOTH
706 Snell Bldg.,
Fort Dodge, Iowa,
Attorney for Petitioner

ALBERT L. HABHAB,
702 Snell Building,
Fort Dodge, Iowa,
Attorney for Petitioner.

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 14,983

John Everett Jensen,
Appellant,

vs.

United States of America,
Appellee.

Appeal from the United States District Court for the Northern District of Iowa

---

(June 17, 1954)

ALBERT L. HABHAB, for Appellant.

F. E. VAN ALSTINE, United States Attorney (RICHARD W. BEEBE, Assistant United States Attorney, was with him on the brief), for Appellee.

Before SANBORN, JOHNSON and COLLET, *Circuit Judges.*

SANBORN, *Circuit Judge*

John Everett Jensen has appealed from a judgment and sentence based upon the verdict of a jury finding him guilty under an indictment which charged that during the months of July, August and September, 1952, he carried on the business of a wholesale liquor dealer in the Central Division of the Northern District of Iowa, and willfully failed to pay the special tax required by federal law, in violation of §3253, Title 26, U. S. C.

At the close of the evidence, Jensen moved for a directed verdict of acquittal, and, after the jury had returned a verdict of guilty, moved the court for a judgment of acquittal, and, in the alternative, for a new trial. His motions were denied. He asserts that the District Court erred in failing to direct a verdict in his favor and in failing to enter a judgment of acquittal after the verdict.

Section 3254 (b), Title 26, U. S. C. A., provides that "* * * every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors in quantities of five wine-gallons or more to the same person at the same time, shall be regarded as a wholesale dealer in liquor: * * *."

By his appeal Jensen challenges the sufficiency of the evidence to make the issue of his guilt one of fact for the jury. It must be remembered that "In considering the sufficiency of the evidence to sustain the verdict of the jury, this Court must take that view of the evidence which is most favorable to the Government, must give to the Government the benefit of all the inferences which reasonably may be drawn from the evidence; and must refrain from concerning itself with the credibility of witnesses and the weight of evidence. Holmes v. United States, 8 Cir., 134 F. 2d 125, 130, certiorari denied 319 U. S. 776, 63 S. Ct. 1434, 87 L. Ed. 1722; Egan v. United States, 8 Cir., 137 F. 2d 369, 375, 376; Miller v. United States, 8 Cir., 138 F. 2d 258, 259; Affronti v. United States, 8 Cir., 145 F. 2d 3, 5.

Viewed in the light most favorable to the Government, the evidence was, in substance: that sometime in the summer of 1952 Jensen's Ford Pickup truck, "full of whiskey," was in a cornfield on the Less farm near Fort Dodge, Iowa; that in August of 1952 Jensen asked James M. Williams, of Fort Dodge, a bartender in Ralph's Tap Room, if he could use some whiskey; that Williams said that he could and Jensen replied that he would have some coming in a few days; that about August 5, 1952, Paul Ross told Williams that Jensen has the whiskey; that this was in the morning about 8:30 or 9:00 o'clock; that

Williams met Jensen and Ross east of town on a country road; that Ross took Jensen back to town and they brought out a carload of whiskey in a Buick automobile; that they stopped the car and took ten cases of whiskey out of it, and Williams put it into his car; that he told Ross to come to the tavern and get the money for it, because Williams did not want Jensen coming in; that Williams paid Ross for the whiskey; that Jensen was driving the Buick automobile which contained the whiskey; and that Williams got 240 pints in that transaction.

The government's evidence further showed that about September 20, 1952, Williams met Jensen in the Blue Bomber Tavern, and Jensen asked him if he (Williams) could use more whiskey; that Williams said that he could, and would take 20 cases; that on the morning of September 26, 1952, Williams agreed to meet Ross at the Less farm to get one case of whiskey at noon and the other 19 cases that night; that when Williams went out to the farm at noon he got the one case and saw Everett Jensen's Ford truck there "full of whiskey"; that Williams went back to the farm that night; that Jensen, Ross and Less were there; that they took about 12 cases out of the cornfield and another 7 cases off the top of the Jensen truck; that Jensen helped get the whiskey out of the cornfield and got up on the truck and handed the whiskey from the truck to Less; that Jensen had quoted Williams a price of $40.00 per case; and that Williams paid Ross $400.00 for the whiskey he obtained in August and $800.00 for the 20 cases of whiskey he obtained in September. The Government proved that Jensen did not pay the special tax required of a wholesale liquor dealer.

Jensen testified on his own behalf as follows: that he lived in Fort Dodge, Iowa; that he worked on a farm in the summer of 1952; that he then lived near the Blue Bomber Tavern, which he believed was owned by Paul Ross and his brother; that at no time did he (Jensen) talk with Williams about the sale or purchase of whiskey; that Jensen was acquainted with the Less family, but had nothing to do with making arrangements with them for the storage of whiskey; that he paid them no rental;

that he never offered to sell whiskey to Williams and never received any pay from him for whiskey; that he was present on the Less farm on two different occasions when Williams loaded whiskey into his car; that on the first occasion, Ross, Williams and Jensen carried whiskey from the cornfield and put it in Williams car; that Williams drove off; that Williams did not talk to Jensen about paying any money; that Williams did talk with Ross about money and told him to "stop down to the tavern and pick up some money"; that Jensen's truck was not there on the first occasion and he had nothing to do with putting the whiskey on the farm.

Jensen further testified that at the time of the second transaction with Williams-Ross, Williams, Jensen and three of the Less family were there; that some of the whiskey was on Jensen's truck; that he had loaned the truck to Ross the afternoon before; that there was no whiskey on it when he loaned it; that he did not see the truck until noon the next day; that when he saw what was on the truck he told Ross that "I didn't particularly like the way he was doing business with my truck"; that after awhile Williams came and wanted a case of whiskey; that Ross asked Jensen to take Williams to the cornfield to get a case of whiskey, which Jensen did; that he did not see Williams pay Ross; that Ross took Jensen to town; that Jensen had asked Ross at noon for Jensen's truck, but Ross said that "it would be twice the work to have to unload the truck," that Ross told Jensen to meet him at seven o'clock; that Jensen met him and they went to the Less farm in Ross' car, and loaded the car with whiskey; that Williams drove up and said to Ross, "Can I get my whiskey now," and Ross said: "Yes, just a minute. We will load your car now"; that "all of us proceeded to load both cars"; that after both cars were loaded, Williams and Less drove off together, and Ross drove off by himself; that Ross returned to the farm shortly and "we loaded his car again"; that after Ross left, Jensen handed the whiskey down from his truck "to the other fellows"; that he then took his truck home; and that Williams did not pay him any money.

In rebuttal, Williams testified that on the night he helped load the whiskey in his car, Jensen, at the request of Ross, used Jensen's truck to deliver whiskey probably to the home of the brother of Ross; and that Ross and his brother were operating the Blue Bomber tavern together.

Eldo Less testified to a discussion he had on the night whiskey in Jensen's truck was being handled on the farm; and that Jensen told him that on the previous night "the truck pretty near didn't make it up there; that his brakes were not working and the old truck was not running too good."

That there was a wholesale illicit liquor business being carried on or from the Less Farm in the vicinity of Fort Dodge, Iowa, was conclusively shown by the evidence of the Government; there was direct evidence that Jensen had twice offered to sell whiskey in wholesale quantities to Williams, and that Williams had twice procured whiskey in such quantities, with Jensen present and taking part in the deliveries. Whether Jensen was carrying on the business and had willfully failed to pay the tax, as the Government claimed, or whether he was acting as a sort of flunky for Ross as Jensen claimed, was clearly a question of fact for the jury. The jury were not required to believe Jensen's testimony. They were the judges of the facts, the credibility of the witnesses, and the weight of the evidence. They were, in our opinion, entirely justified in concluding that Jensen was guilty of the offense charged in the indictment. See and compare, Heath v. United States, 10 Cir., 169 F. 2d 1007; Jenkins v. United States, 5 Cir., 149 F. 2d 118, 119.

The District Court did not err in submitting the case to the jury, and could not properly have done otherwise. The judgment appealed from is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

(Judgment)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1953
Thursday, June 17, 1954

No. 14,983

John Everett Jensen,

Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Northern District of Iowa.

This Cause came on to be heard on the record from the United States District Court for the Northern District of Iowa and was argued by counsel.

On consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, John Everett Jensen, do surrender himself to the custody of the United States Marshal for the Northern District of Iowa, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

June 17th, 1954.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	8

CITATION

Cases:

Bailey v. *United States*, 259 Fed. 88	7
Heath v. *United States*, 169 F. 2d 1007	7
Rood v. *United States*, 7 F. 2d 45	7
Sodini v. *United States*, 261 Fed. 913	7
United States v. *Harbison*, Federal Case No. 15,300	7
United States v. *Rennecke*, 28 Fed. 847	7

Statute:

26 U.S.C. 3253	2
26 U.S.C. 3254	3

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 254

JOHN EVERETT JENSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 12) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 17, 1954 (Pet. 17). On July 16, the time for filing a petition for a writ of certiorari was extended to August 2, 1954, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the record contains substantial evidence to support the verdict of guilty on a charge of wilfully failing to pay the special tax required by law while carrying on the business of a wholesale liquor dealer.

STATUTE INVOLVED

26 U. S. C. 3253 and 3254 provide, in pertinent part:

> *Section 3253. Penalties and forfeitures for non-payment of special tax.*
>
> Any person who shall carry on the business of a brewer, rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, retail dealer in malt liquors, or manufacturer of stills, and willfully fails to pay the special tax as required by law, shall, for every such offense, be fined not less than $100 nor more than $5,000 and be imprisoned for not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in any building, room, yard, or enclosure connected therewith and used with or constituting a part of the premises, shall be forfeited to the United States.

Section 3254. Definitions

(b) Wholesale dealer in liquors. Except as otherwise provided, every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors in quantities of five wine-gallons or more to the same person at the same time, shall be regarded as a wholesale dealer in liquors: *Provided,* That the Commissioner may, by regulations, with the approval of the Secretary, provide for the issuance of a stamp denoting payment of such special tax as a "wholesale dealer in wines" or a "wholesale dealer in wines and malt liquors" if, as the case may be, wines only, or wines and malt liquors only, are sold by a wholesale dealer in liquors.

STATEMENT

In the District Court for the Northern District of Iowa, a jury found petitioner guilty on an indictment (R. 1) charging violation of 26 U.S.C. 3253 by wilfully failing to pay the special tax required by law for carrying on the business of a wholesale liquor dealer during 1952 (R. 2). He was sentenced to one year's imprisonment and fined $100 (R. 2-3). On appeal, the judgment was unanimously affirmed (Pet. 17).

Petitioner's basic contention is that the record lacks substantial evidence to support his conviction. The evidence for the government may be summarized as follows:

An employeee of the Bureau of Internal Revenue testified that the special tax imposed on wholesale liquor dealers was not paid by petitioner during 1952 (R. 3, 4).

James Williams, a bartender at Ralph's Taproom, testified that petitioner asked him whether he could use some whisky. Williams told him that he could and petitioner said that he would have some coming in, in a few days. (R. 6.) This meeting took place at the Blue Bomber Tavern, and one Pauly Ross, reputedly the owner of the Blue Bomber Tavern (R. 9, 11, 13), was present (R. 6). A few days later, Ross told Williams that petitioner had the whisky and Williams agreed to meet petitioner on a country road east of the town (R. 6-7). Ross, who was present at this meeting, brought out an automobile load of whisky with petitioner and transferred 10 cases containing 240 pints to Williams' car (R. 7). Jensen was driving the car which brought out the liquor (R. 7). Williams told Ross to come to the tavern to get the money because "I did not want Everett [Jensen] coming in." (R. 7.)

A similar transaction occurred in the following month. Petitioner again asked Williams if he could use more whisky, Williams agreed, and Ross reported to Williams when the whisky was ready. (R. 7.) The parties met at the farm of one Less, where, Williams testified, he saw petitioner's Ford truck loaded with whisky (R. 8). He took one case; that evening, he obtained 19 cases, off the truck and from a corn field (R. 8). Petitioner

quoted Williams a price of $40 per case in both transactions (R. 8), and in both instances the money was actually handed to Ross (R. 9).

Less testified that Ross had arranged with him for storage of the liquor at his farm (R. 5, 6). He also said that he saw petitioner's truck, loaded with whisky, at the farm and that he helped petitioner and Ross load the whisky on to Williams' car on the night of the second occasion (R. 5). Ross was called as a government witness but refused to testify on the ground of self-incrimination since he was a defendant in a case about to be tried (R. 9).

Petitioner denied making arrangements with Williams for the sale of whisky. He testified that on the first transaction he helped load the whisky on Williams' car at Ross' direction. (R. 11-12.) With respect to the second transaction when the whisky was in his truck, he testified that he had loaned his truck to Ross the afternoon before (R. 11). He testified that, after the transaction with Williams, Ross came back, loaded his car again; that thereafter petitioner emptied his truck and drove it home. (R. 12).

In rebuttal, Williams testified petitioner had not taken his truck home from the corn field empty, but at Ross' request helped deliver a load of whisky downtown to Ross' brother's home (R. 12, 13). Less testified (in contradiction to petitioner's statement that he did not see his truck on the evening preceding the second transaction) that petitioner had discussed with him the difficulties

encountered in driving the truck to the Less farm (R. 13).

ARGUMENT

Although admitting that "The learned judge who wrote the decision in the Court below recognized that the offense does not consist in selling or offering for sale to a particular person distilled spirits, etc., but in carrying this on as a business" (Pet. 8), petitioner nevertheless asserts that the decision below is in conflict with other decisions so holding. It manifestly is not. The trial court carefully and fully instructed the jury as to the nature of the crime charged in accordance with the principles laid down in the cases relied upon by petitioner.[1] The evidence that petitioner solicited sales of liquor in wholesale quantities, quoted prices to the one solicited, and participated in delivery of the liquor, was ample to support the jury's finding that petitioner was carrying on a wholesale liquor business.

The test of engaging in business is "that the defendant either had liquor on hand, or was ready and able to procure it, in either case with the purpose

---

[1] The court instructed the jury, in Instruction No. 5: "The gist of the crime with which the defendant is charged, is not the selling of liquor. The gist of the crime with which he is charged is of being a wholesaler of liquor and wilfully failing to pay the special federal tax imposed upon such wholesalers." The court charged in Instruction No. 6: "the burden is upon the Government to prove beyond a reasonable doubt the following propositions: 1. That during the months of July, August, and September, 1952, the defendant, John Everett Jensen, in Webster County, Iowa, did carry on the business of selling liquor at wholesale." (R. 15.)

of selling some or all of it to such persons as he might from time to time find or conclude to accept as customers." *Bailey* v. *United States,* 259 Fed. 88, 92 (C.A. 6). On this factual issue, sales are obviously primary evidence, to be considered with all the surrounding circumstances. *Heath* v. *United States,* 169 F. 2d 1007 (C. A. 10); *Sodini* v. *United States,* 261 Fed. 913 (C.A. 6); *Bailey* v. *United States, supra;* cf. *Rood* v. *United States,* 7 F. 2d 45 (C.A. 4), recognizing the principle but reversing on another ground. It has never been required that the seller have the equipment of a storekeeper. *Rood* v. *United States, supra; United States* v. *Rennecke,* 28 Fed. 847 (W.D.S.C.); *United States* v. *Harbison,* Federal Case No. 15,300 (C.C.E.D. Tenn.).

Petitioner's claim, based on his own testimony, that he was merely acting as a hireling of Ross was obviously a factual issue for resolution by the jury.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
JOSEPH A. BARRY,
Attorneys.

AUGUST, 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 313934